IN THE

Supreme Court of the United States

October Term, 1964

No. 86

LOUIS ZEMEL,

Appellant,

v.

DEAN RUSK, Secretary of State, and ROBERT F. KENNEDY, Attorney General,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPELLANT'S REPLY BRIEF

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Citations

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I

The Case Was Properly Heard by a Statutory Court.

Appellees urge that 28 U. S. C. 2282 is inapplicable because appellant seeks to enjoin the operation of the statute only as applied to Cuban travel (Br. 16).[1] Here appellees are in error on both the facts and the law.

First, appellant has done more than challenge the application of the statute to geographical limitations. The complaint alleges that the statutes are unconstitutional because "they contain no standards and are therefore an invalid delegation of legislative power" (R. 4); the relief sought includes "enjoining the defendants from carrying out or

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[1] "Br." refers to appellees' brief; "App. Br." to appellant's original brief; "R." to the record.

enforcing the said statutes" (R. 5). If appellant's position is sustained, the statute is void upon its face.

Appellees' characterization of the delegation point as "frivolous" (Br. 18, n. 2) cannot be seriously urged in view of the weight given to this very argument by the Court in *Kent* v. *Dulles*, 357 U. S. 116, 129, and by Circuit Judge Smith's opinion below that the statute as construed "poses a problem of invalid delegation, for there are no standards in the statutory language, legislative history, or administrative practice" (R. 52). This, of course, distinguishes the case from that of *William Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, where the attack upon the statute's constitutionality was held to be insubstantial.[2]

Second, a statutory court would be required here even if the complaint had not attacked the statute upon its face but only "as applied" to geographic limitations. The Court has never held that a suit cannot be brought under Section 2282 if the statute might also be applied constitutionally. No Justice of the Court questioned the necessity of a statutory court in *Aptheker* v. *Secretary of State*, 378 U. S. 500, although the dissenting opinion urged that the statute was constitutional at least as applied to the appellants in that case.

Appellees' argument that only "mandatory" and not "permissive" legislation requires a statutory court is not consistent with the language of the statute, the decisions of this Court or the salutary purpose of the statute.[3] Neither

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[2] See also Currie, *The Three Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 54, agreeing that the charge of "invalid delegation" in the instant case required a three-judge court.

[3] See also *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649, 658 (E. D. La. 1961), aff'd per curiam, 368 U. S. 515; Currie, *op. cit. passim*. See also *Fleming* v. *Rhodes*, 331 U. S. 100, 102-104, upholding an appeal under the Act of August 24, 1937, 50 Stat. 751.

Phillips v. *United States*, 312 U. S. 246, nor *Ex parte Bransford*, 310 U. S. 354, supports this "mandatory-permissive" dichotomy of appellees since the complaint in neither of those cases even mentioned the authorizing statute.[4] This is plain from the opinions of the Court in those cases. Indeed in the latter case the Court explicitly distinguished "between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional". *Ex parte Bransford*, 310 U. S. 354, 361.

Appellees rely, for purposes of contrast, upon 28 U. S. C. 2281, as amended in 1913,[5] to include suits to restrain the enforcement of state administrative boards or commissions (Br. 15). But that amendment was intended to deal with a very different problem which concerned Congress, unconstitutional rate regulation under a statute not challenged as unconstitutional. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 292; Currie, *op cit.*, *supra*, p. 50.

Appellees seem to be arguing that because statutory courts have not usually been sought in passport cases, one is inappropriate here (Br. 21). This argument overlooks the fact that in those cases, *Kent* v. *Dulles*, *supra*, particularly, the plaintiff did not seek to enjoin the operation of the statutes as unconstitutional. Where such an injunction was sought, a statutory court properly sat although it ultimately held that the statute, not the Secretary's action, was constitutional. *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. D. C.).

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[4] See Mr. Justice Frankfurter in *Phillips*, 312 U. S. 252, and Mr. Justice Reed in *Bransford*, 310 U. S. at 361. For a thoughtful criticism of these cases, see Currie, *op. cit.*, pp. 37-50.

[5] Act of March 4, 1913, c. 160, 37 Stat. 1013.

Our view finds analogical support in the Court's decisions under 28 U. S. C. 1257(2) under which appeals may be taken to this Court as of right from state court judgments "where is drawn in question the validity of a statute of any state" on constitutional grounds. The Court has held that this includes cases where the administrative agency exercises discretion under a broad statute whose constitutionality upon its face is not subject to challenge. See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-290.

The instant case is one peculiarly calling for consideration by a statutory court to achieve the salutary purposes of 28 U. S. C. 2282. It involves a substantial constitutional right for which protection is sought against the enforcement of a statute challenged as unconstitutional both on its face and as applied. It meets every criterion which this Court has held relevant under 28 U. S. C. 2282: (1) the direct challenge in the complaint of the statute both as written and as applied,[6] (2) the substantiality of the constitutional attack,[7] (3) the prayer for injunctive relief,[8] and (4) the effect of an injunction upon an entire regulatory system.[9] Under these circumstances, the court below was clearly correct in holding that it had jurisdiction as a statutory court.

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[6] *Ex parte Bransford, supra*; see *Memphis Natural Gas Co.*, v. *Beeler*, 315 U. S. 649, 650-51.

[7] *Schneider* v. *Rusk*, 372 U. S. 224.

[8] *Cf. Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144.

[9] This is not the case of "a single unique experience", *Phillips* v. *United States, supra*, at 253, but one of "unusual gravity", *Ex parte Collins*, 277 U. S. 565, 569 (Brandeis, J.).

The President Does Not Have Inherent Power to Prohibit Travel to Particular Areas.

Appellees' discussion on the merits is an essay in abstraction [10] because it ignores the nature and importance of the liberty involved—the right to travel which the Court has upheld in *Kent* v. *Dulles, supra,* and *Aptheker* v. *Secretary of State,* 378 U. S. 500, upon constitutional grounds, against both administrative and legislative action. Appellees, in contrast, have placed this particular liberty to travel on a rung of the constitutional ladder sufficiently low that it might be impaired by the Secretary without statutory authority because of its possible effect upon foreign relations (Br. 41). But in both *Kent* and *Aptheker,* the Court treated the right to travel not merely as a liberty of movement but as one with profound implications for the exercise of First Amendment rights and of the duties of citizenship in a democracy, *Kent* v. *Dulles,* 357 U. S. 116, 126-127; *Aptheker* v. *Secretary of State,* 378 U. S. 500.

Appellees' claim of inherent power, which was not adopted by the court below, is directly contrary to the Court's decision in *Kent* where it held that the right to travel was not subject constitutionally to impairment by the Secretary, 357 U. S. 116.[11] This doctrine was underlined by the Court's discussion in that case, 357 U. S. 128-129, of *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S.

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[10] This is compounded by appellees' "symbiotic" approach (Br. 43) which avoids a close analysis of the claims of inherent executive power and of statutory authority by merging the two problems.

[11] In the Court of Appeals, Judge Bazelon, dissenting, had stated earlier: "The broad power to curtail the movement of citizens of the United States to the extent that our Government possesses it, is vested in Congress, not in the President." *Briehl* v. *Dulles,* 248 F. 2d 561, 569, revs'd *sub nom. Kent* v. *Dulles, supra.*

579, on the issue of law-making power.[12] It is a most superficial reading of *Kent* (Br. 54) which would make only liberty of exit, not liberty of travel, free from executive interference.[13]

Appellees are equally incorrect in arguing that the Court made congressional action a prerequisite to restrictions upon movement only where the restrictions were based upon political associations (Br. 53). This Court's discussion of the need for "joint action by the Chief Executive and the Congress", 357 U. S. 116, 128, was made with reference to the "constitutional right of the citizen" to travel, not the right to equality of treatment for persons of different political views.

The constitutional principle against executive law-making is not a sport in constitutional law limited to liberty of movement. No right, whether of personal liberty or of property, can constitutionally be impaired by executive action even where the claim is one of war emergency, *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* In that case, involving, unlike here, a very real problem affecting national defense during the Korean War, this Court stated:

> "* * * In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks

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[12] In *Aptheker* v. *Secretary of State*, 378 U. S. 500, 518, Mr. Justice Black stated: "Without reference to other constitutional provisions, Congress, has, in my judgment, broad powers to regulate the issuance of passports under its specific power to regulate commerce with foreign nations."

[13] See the references in that opinion to the right of "travel", 357 U. S. at 129, "the free movement of citizens", *id.* at 130, "freedom of movement", *id.* at 126 and "[f]reedom of travel", *id.* at 127; and in *Aptheker* to "the right to travel abroad", 378 U. S. at 505, 507-508.

> wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." 343 U. S. 579, 587.

See also *United States* v. *Eaton,* 144 U. S. 677, 688; *Morrill* v. *Jones,* 106 U. S. 466, 467.

"Foreign policy" no more constitutionally justifies disregard of the separation of powers doctrine than did the far more critical war power relied upon in *Youngstown.* When Chief Justice Taney said that "[a]ll the powers which relate to our foreign intercourse are confided to the general government"; *Holmes* v. *Jennison,* 14 Pet. (39 U. S.) 540, 570, he was not discussing an inherent executive power to dispose of liberty and property.[14] The Court's reference to the President's power over foreign affairs as "exclusive" and independent of "an act of Congress", *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 320, must be read in context. The issue there was not whether the President had inherent power, but whether the standards under a statute unequivocally authorizing an arms embargo were a sufficient basis for his action.

Nor does *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U. S. 103, uphold appellees' thesis of an inherent executive power to dispose of liberty or property because foreign relations are involved. In that case, the Court held that Executive action authorized by Congress with respect to foreign air route licenses was not reviewable judicially because of foreign policy considerations.[15]

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[14] Judge Bazelon's recital of foreign relations cases did not suggest that the President had inherent power in all such cases; many of them were examples of congressional authorization, *Briehl* v. *Dulles,* 248 F. 2d 561, 566-568, reversed *sub nom. Kent* v. *Dulles,* 357 U. S. 116. The original proposal to give the foreign relations power exclusively to the Executive was rejected, *The Federalist,* No. 75.

[15] The distinction is noted by Mr. Justice Jackson concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 635-636, n. 2. Further, one presumably has no greater property right in an air route than he has a right to demand a government contract.

The President does have inherent power over foreign affairs in such matters as recognition of foreign governments, negotiating treaties and receiving ambassadors, which are explictly delegated to him by the Constitution.[16] But he does not possess plenary power over the liberties or properties of American citizens or residents, and no cases in this Court have so held. Only an indifferent reading of the Litvinov Assignment cases, *United States* v. *Pink*, 315 U. S. 203, and *United States* v. *Belmont*, 301 U. S. 324, could have led appellees to a contrary conclusion (Br. 39-41). In *Belmont*, the Court took pains to describe the defendant as a mere custodian of funds in which it had no interest;[17] in *Pink*, the Court noted that the local creditors had been paid and it held that a government had a right to reallocate assets as against foreign creditors. 315 U. S. 203, 226-227.

The claim of inherent executive power is not enhanced by the assertion that "suspension of travel to a foreign country is a recognized instrument of foreign policy" (Br. 40).[18] If this were true, it might well be urged in the arenas of diplomacy or international law; it is not responsive to the American citizen's constitutional objection to executive lawmaking. Appellees seek circuitously to establish their foreign affairs argument by describing the passport as a diplomatic document (Br. 40); their earlier at-

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[16] It is to such matters that the Senate Foreign Relations Committee and Congressman (later Chief Justice) Marshall referred in the statements relied upon by appellees (Br. 38). In *Marbury* v. *Madison*, 1 *Cranch* 137, 166 (1803), Chief Justice Marshall, in discussing executive powers beyond judicial control, said, "[t]he subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."

[17] 301 U. S. 324, 332.

[18] The texts cited are most general in their observations and their emphasis is on trade regulation which itself requires legislative action (App. Br. 42).

tempt in Kent[19] was rejected by the Court, 357 U. S. at 129. It is strange to be told now that "the discriminatory interdiction voided in *Kent* had little, if any, relation to foreign policy" (Br. 12) in view of the Government's argument in that case.[20]

The claim of inherent power is the assertion of the royal prerogative in modern dress. But the *writ ne exeat* as a restriction upon the travel of citizens is essentially outmoded; its vestigial remains, if any, were bequeathed to the Congress, not to the President, upon the adoption of the Constitution. *Blackmer* v. *United States*, 284 U. S. 421, 437-438.

Since the Constitution does not give the Executive the power to prohibit travel to particular areas, the arrogation of that power by the Secretary could not accomplish that result. The opinions of Justices Frankfurter and Clark in *Youngstown, supra,* at pp. 610, 635, indicate that even substantial precedents of executive action[21] cannot breach the doctrine of separation of powers; *a fortiorari,* the few instances of announced passport restrictions, under ambiguous circumstances, often in wartime and usually without sanctions, cannot establish the existence of inherent power in the President to prohibit travel. We discuss the Secretary's practices more fully below in meeting the argument that these administrative practices have still another function, the establishment of congressional intent in the passage of legislation.

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[19] Brief of the Solicitor General in *Kent* v. *Dulles*, Oct. Term 1957, No. 481, pp. 18, 19.

[20] Brief of the Solicitor General in *Kent* v. *Dulles*, Oct. Term 1957, No. 481, pp. 18-19, 93.

[21] Mr. Justice Frankfurter pointed to precedents "over a period of 80 years and in 252 instances", 343 U. S. 579, 611.

III

There Is No Statutory Authority.

As previously indicated, *supra*, p. 5, it is not always easy to distinguish between appellees' arguments on the two separate issues of inherent executive power and of statutory authority. Statutes are treated as establishing inherent power and the latter in turn is used to explain the statutes. Having treated the inherent power issue separately, we now turn to the issue of statutory power.

A. The Passport Act of 1926

Appellees begin by describing the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. 211a, as conferring on its face an "unequivocally discretionary" power (Br. 42) which "must include the power to determine the countries for which passports will be issued," *ibid.*

This description flatly ignores the Court's recognition in *Kent* of the limited purpose of that statute and its two predecessors, 357 U. S. at 127. It is not permissible to rewrite a statute by embellishing its plain language, disregarding the reasons for its passage, and radically changing its purpose in order to avoid a "niggardly construction" in the area of "foreign affairs" (Br. 43). As *Kent* holds, the Secretary's interference with the travel of United States citizens is a matter of domestic law, 357 U. S. at 123, and the established canons of interpretation in matters affecting liberty require a narrow construction of this particular statute, 357 U. S. at 129-130. Thus read, the statute remains what this Court thought it was in *Kent*, an act to prevent the fraudulent issuance of passports by authorizing their issuance only by the Secretary of State.

Significantly, appellees nowhere state flatly that the statute was intended to grant power to impose area restrictions. Instead, we are told in most elusive language

that the statute should be read as "*confirming* and *regularizing*" the "broad authority . . . over passports" so that the statute is, in a "*substantial sense*, an independent *source* of the authority to limit the areas for which passports shall be issued" (Br. 42-43, italics added). Appellees' hesitancy is underscored by their emphasis that it "is unnecessary to pitch the case upon either source of authority alone" (Br. 43) because inherent executive power and statutory power "have grown together in a symbiotic relation" (*ibid.*). No judicial precedent is cited for this claim that an inadequate statute and an insufficient grant of executive power can grow by symbiosis into a constitutional exercise of power over liberty or property.

Appellees' reference to the Secretary's practices prior to the Act of 1926 might, of course, be relevant for the limited purpose of determining what Congress intended in that statute, *Kent, supra,* p. 128, although it is doubtful that they could be used to establish a meaning different from the original statute [22] which employed substantially the same language. The truth is that appellees' recital of the Secretary's practices is so insubstantial and irrelevant that it cannot establish a congressional intention to authorize the imposition of area restrictions by the Secretary.

1. Appellees begin their recital of past practice with the Act of February 4, 1815, § 10, 3 Stat. 195, which prohibited travel to certain enemy areas (Br. 44). Aside from the fact that it is an example of congressional, not administrative, action it shows how Congress can and does act when it desires to impose area restrictions.[23]

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[22] Act of August 18, 1856, Sec. 23, 11 Stat. 52.

[23] Other examples of explicit area restrictions authorized by Congress may be found in The Neutrality Act of 1939, P. Res. 54, 76th Cong. § 3, 54 Stat. 4, 7, and in P. Res. 67, 49 Stat. 1081 (Aug. 31, 1935).

2. In the Civil War example, Secretary of State Seward announced that "[i]nsurrectionary assemblages avow the fact that they are sending agents to Europe on errands hostile and injurious to the peace of the country and dangerous to the Union", 3 Moore, *Digest of International Law*, 920 (1906). This was a ban upon travel for imputedly dangerous purposes of the type disposed of by *Kent;* it was not an area restriction.

3. Appellees' other examples are discussed by the State Department's official commentator under the heading "War Regulations", 3 Hackworth, *Digest of International Law* (1942) § 272. He correctly points out that when the first restrictions were imposed, "American citizens were not required by law to carry passports", *id.* at 526. Therefore, there was no "prohibition" of travel such as is claimed here (Br. 53). Indeed, the State Department's notice of November 17, 1914, to which the appellees refer (Br. 44), merely "advised" American citizens "to avoid visiting unnecessarily countries which are at war", 1915 For. Rel. Supp. 905-906; Hackworth, *op. cit.* at 526[24]

4. Executive Order No. 2519-A[25] (Br. 44) is completely inapposite. It was promulgated at a time when a passport was not required for travel. It was silent on the subject of area restrictions. The authority which it gave the Secretary to refuse passports in his discretion was the very authorization embodied in a later executive order which was stricken in *Kent.*

5. Finally, appellees note that "[n]o passports were issued for travel in Germany and Austria until July 18, 1922, and none for Russia until September, 1923" (Br. 45). There is no indication that such travel was actually prohibited.

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[24] On similar attempts to "dissuade" travel, see 1915 For. Rel. Supp. 899.

[25] Reprinted in For. Rel., 1917, Supp. 1, p. 573.

This recital of events antedating the Passport Act of 1926 is a most insubstantial basis for imputing to Congress an intention to give the Secretary plenary power over the travel of American citizens under a statute which does not say so.

The congressional intent is even less susceptible of proof by viewing the Secretary's conduct subsequent to the passage of the statute. Official behavior, no matter how self-seeking, can never establish in an administrative agency power over liberty or property beyond that of the language of the congressional enactment.[26] It was for that reason that this Court's interpretation in *Kent* of the Passport Act of 1926 was based upon the Secretary's practices antedating that statute and that the Court disregarded the very substantial denial of passports for political reasons, upon which he relied after that date.[27] We note, however, that all but the most recent ones involved denial of passports and not denial of the right to travel, that the Department of State was by no means clear that travel was "prohibited" in more than a hortatory sense,[28] and that there were no

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[26] Appellees' citations are not in point (Br. 50). The *Pocket Veto* case, 279 U. S. 655, involved a unique problem of relations between the President and Congress. *United States* v. *Midwest Oil Co.*, 236 U. S. 459 did not interfere with the property or liberty of the citizens, *id.* at 475.

[27] See the dissenting opinion of Mr. Justice Clark in *Kent* v. *Dulles*, 357 U. S. at 130, 135, 139, 141; Brief of the Solicitor General in *Kent*, pp. 60-72; *The Right to Travel*, Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong. 1st Sess. pursuant to S. Res. 49, as extended by S. Res. 234, 85th Cong. 2d Sess., *passim*.

[28] The State Department has advised Congress: "It means that if the bearer enters country X he cannot be assured of the protection of the United States. For this reason, and frequently for other reasons, it means that the United States does not approve of the bearer's going to country X. The restriction on the passport does not necessarily mean that if the bearer travels to country X he will be violating the criminal law . . .". *Department of State Passport Policies*, Hearings before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess., p. 59.

criminal prosecutions until 1963 when American college students visited Cuba.

B. Section 215(b) of the Immigration and Nationality Act

Appellees make no claim that the language of Section 215(b) authorizes the imposition of area restrictions. They do not challenge our statement of its purposes (App. Br. 30, *et seq.*), and they recite no legislative history to meet the detailed proof set forth in our original brief (App. Br. 31-37).

Nor do appellees argue that the Secretary relied upon Section 215(b) as the basis for the area restrictions. Instead, they say that the statute "confirms the authority of the Secretary to impose area restrictions",[29] that Congress "must have been aware"[30] of the Secretary's passport restrictions and that "the new provision was not intended to curtail the existing discretion of the Executive".[31]

The basic difficulty with appellees' argument is that, in defiance of both congressional language and objectives, it would turn an American border control statute into one prohibiting travel to particular foreign areas, and a national defense statute operating in wartime into a foreign affairs statute operating in peacetime. The argument that the "greater power", *i.e.*, to forbid passports entirely, "neces-

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[29] Br. 56.

[30] *Ibid.* Since the "Secretary's past restrictions" were never based upon Section 215(b) or its predecessor statutes, the Court did not regard them in *Kent* as relevant to the interpretation of that section, and the same result would follow here. *United States* v. *Healy*, 376 U. S. 75 (Br. 61) cited by appellees did not involve the construction or application of Section 215(b).

[31] Br. 57.

sarily includes the lesser power" (Br. 61) assumes that the same kind of power is under discussion. But in 1952 (as in 1918 and 1941) Congress authorized the President to prevent particular aliens and citizens from entering or departing from the United States if there were reason to believe that they were involved in espionage or similar activities injurious to the prosecution of war (App. Br. 31, 35, 37). Congress expressed no interest at all in the foreign countries from which travellers came or to which they wished to go. It certainly did not authorize area restrictions in general aid of our foreign policy.

Appellees urge that the failure of Congress to enact legislation which would authorize area restrictions may be disregarded because Congress may have considered them "superfluous" and the bills dealt with a "wide range of problems" (Br. 51, n. 10). Actually, most of the bills were concerned with only two problems: area restrictions and Communist travel. There is no basis for believing that legislation so consistently and vigorously urged in two branches of the Government was regarded as "superfluous". There is no recorded instance of opposition to the legislation on this ground.

IV

The Restrictions Upon Travel Are Unconstitutional.

We believe that this case should be treated precisely as the Court did in *Kent*: (1) There is no inherent executive power to limit the travel of American citizens; and (2) explicit legislative authority which is required to restrict a liberty is lacking here. In any event, the restrictions should be stricken because they not only fail to meet the rigorous constitutional test suggested in *Kent* for First Amendment situations, but they fail even to meet the lesser test of "reasonableness" proposed by appellees.

A. Appellees' Rule of Reason

1. Appellees' first argument in support of the constitutionality of the travel ban is that it prevents "persons from going to Cuba for training in subversion and then returning to Latin America to perform what they have been taught" (Br. 36). While essentially conceding the harmlessness of travel of United States citizens, appellees urge that we must furnish a good example to the Latin American nations if they are to obstruct the travel of their own citizens.

We submit that it is irrational to deprive United States citizens of the right to travel to Cuba because, it is claimed, some nationals of other countries may engage in "subversion." In *Kent* and *Aptheker*, the right to travel, even of persons beyond the pale politically, was protected; here, our Government would ban the travel of law-abiding United States citizens because the travel of some Latin Americans may be harmful to their countries. This is another kind of wide net which *Aptheker* held to be improper. There are surely means of protecting Latin American nations against their own "dangerous citizens" other than by depriving our citizens of their rights.

2. Appellees next urge that "the indiscriminate travel of American citizens to Cuba could easily lead to incidents which might embroil the United States in international conflict" (Br. 36). This is pure speculation; indeed, appellees refer only to "events [which] occurred before the present Cuban government came to power, and in its early days" (Br. 36).

The "international embarrassment" of having American citizens mistreated (Br. 37) is equally imaginary. No one has ever questioned the Government's ability to protect its citizens abroad. Such "embarrassment" is easily avoided by the familiar warning to citizens that they may lose governmental protection.[33] If despite all this

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[33] See *e.g.* 2 Hyde, *International Law* 1178-1179 (1922); 2 Hackworth, *Digest of International Law* 285 (1942).

the Government is "embarrassed," that is of little weight compared to the deprivation of liberty involved in this case and the light in which it correctly places our country in world opinion.

3. Appellees' third reason is that the United States desires to isolate Cuba from the outside world. The impressive list of economic sanctions against Cuba (supported by legislation in each case except travel) does not raise the serious constitutional problems involved in the infringement of personal liberty. On appellees' theory, it would be entitled to prohibit the travel of American citizens to France upon each occasion of disagreement with President De Gaulle. The desire to isolate another country may justify a breach in diplomatic relations, even a trade embargo. But under no rule of reason can it constitutionally justify the deprivation of the liberty of United States citizens.

B. The Test Applicable to Impairments of Personal Liberty

Liberty of movement was upheld in *Kent* and *Aptheker* not because of the intrinsic value of mobility but because of the uses, protected by the First Amendment, to which that liberty should be put. We need only refer the Court to its discussion in both *Kent* and *Aptheker* of the need of our citizens to visit other countries and to meet their nationals in order better to equip themselves as American citizens.[34] As Mr. Justice Douglas stated, concurring in *Aptheker*:

> "This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all

[34] *Kent* v. *Dulles*, 357 U. S. at 126-127; *Aptheker* v. *Secretary of State*, 378 U. S. at 505-506.

other rights suffer, just as when curfew or home detention is placed on a person." 378 U. S. at 520.

Liberty to travel is a liberty to learn, to read, to see for oneself instead of relying upon official statements or the frequently weighted expressions of the commercial press. The right to criticize public officials, *New York Times* v. *Sullivan*, 376 U. S. 254, is meaningless without the right to obtain relevant information.[35] Appellees' analogy of classified information is a forced one. That would require the Government to take affirmative action to disclose its own papers, often relating to national defense. But the instant case involves the citizen's request only that his search for truth outside official files and press releases be free from governmental obstruction.

The nature of the liberty here involved is such that its impairment, even by Congress, could only occur where there was a showing of the gravest imminent danger to the public safety. See *Kent* v. *Dulles*, 357 U. S. at 128. *Cf. Schenck* v. *United States*, 249 U. S. 47, 52. Since appellees concede, by the standards proposed by them (Br. 41), that they cannot meet this test, the restrictions upon the travel of appellant and all other American citizens are unconstitutional.

Respectfully submitted,

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[35] See *Martin* v. *City of Struthers*, 319 U. S. 141, 143, 146.